NTSB Order No.
EM-70

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day of May 1978.

OWEN W SILER, Commandant, United States Coast Guard,

v.

AMIGO SORIANO, Appellant.

Docket ME-70

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a probationary suspension of his masters mariner's license No. 442203.[1] It was found that appellant, as president of a corporation owning M/V MARLIN, an uninspected vessel of 483 gross tons, had directed the vessel's master to proceed on a voyage carrying freight for hire in willful violation of 46 U.S.C. 367 and 404. In 46 U.S.C. 404, hull and boiler inspection is required for "[a] ll vessels of above fifteen gross tons carrying freight for hire..., but not engaged in fishing as a regular business."[2] This statute is derived, in amended form, from Section 4426, Title 52, of the Revised Statutes of the United States.[3] The sanction was imposed under 46 U.S.C. 239(g), which proscribes the willful violation of any of the provision of Title 52 by a licensed officer. Although appellant was not serving under authority of his license at the time, the Commandant held that the violation charged had "some connection" with activities contemplated under his license; and that the sanction was therefore within the proper

[1]Review of the Commandant's decision on appeal to this Board is authorized by 49 U.S.C. 1903(a)(9)(B).

[2]46 U.S.C. 367 is another inspection law applying to seagoing vessels of 300 gross tons or more excepting "vessels engaged in fishing..." etc.

[3]The revised Statutes comprise the official laws as of December 1, 1873. Unless repealed, the provisions of Title 52, on "Regulation of Steam Vessels," are now found in Title 46, U.S. Code. See note following 46 U.S.C. 170 for sectional distribution.

purview of 46 U.S.C. 239.

Appellant's prior appeal to the Commandant (Appeal No. 2088), was from the initial decision of Administrative Law Judge Elmer N. Buddress, issued after a full evidentiary hearing.[4] Throughout the proceedings herein, appellant has been represented by counsel.

The findings of the law judge with respect to the underlying facts of the case are undisputed.[5] It was found that appellant and the master were which advised separately by the Coast Guardon January 23 and 24, 1976, respectively, that MARLIN's cargo for a voyage from Seattle to Yakutat, Alaska "raised a question of a possible violation of 46 U.S.C. 404"; that the master then discussed the matter with appellant and was told by him that the cargo would stay on board and the vessel would take it; that the master agreed and the vessel sailed on the 24th for Yakutat where, 4 days later, its cargo was off loaded; and that appellant's corporation was paid for the carriage of this cargo.

The issues raised by these findings were (1) whether appellant had acted under authority of his license; and (2) whether a 1968 amendment of the inspection laws exempting vessels of 500 gross tons or less, used the salmon or crab fisheries of the Pacific Northwest and Alaska, if engaged exclusively in those trading patterns, applied to the MARLIN and its cargo. The law judge considered the first issue immaterial, citing 46 CFR 5.01-40 of the Coast Guard regulations as the authority for proceeding against appellant's license regardless of the fact that he was functioning on behalf of the vessel owner and acting solely in that capacity (I.D. 6)[6]

The second issue was also decided against appellant although

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[4]Copies of the decisions of the Commandant and the law judge are attached.

[5]Being largely based on a formal stipulation signed by appellant and the Coast Guard representative, received in evidence as Exhibit 1.

[6]46 CFR 5.01-40 provides as follows: "(a) Under Title 46, U.S. Code, section 239, suspension and revocation proceedings may be conducted, without regard to whether the person charged was in the service of a vessel at the time of the alleged offense, when the charge is a willful violation of any of the provisions of Title 52 of the Revised Statutes...."

his testimony was unrefuted that MARLIN's cargo had been delivered to a Yakutat dock which served the salmon and crab fisheries as a freezer facility (Tr. 24-5). Upon examination of the cargo manifests,[7] the law judge found that it contained the names of "a great many consignees not shown to have any connection with the fishing industry"(I.D. 9). He concluded that the cargo must be exclusively for the fisheries in order to qualify for exempted status; that "a substantial portion of (MARLIN's) cargo on this voyage was for persons or corporations outside that industry" (Id.); and that the statutory violation was therefore established. In assessing sanction, the law judge found that although the offense was willful and deliberate, appellant's record of seagoing service over a period of forty-four years justifies a probationary order" (I.D. 10, 11). He thereupon entered a 6-month suspension, not to take effect unless a new charge under 46 U.S.C. 239 should be proved against the appellant during a 12-month period of probation.

In a brief on appeal, appellant contends that the law judge erred in determining both of the legal issues presented at the hearing, and that the Commandant erred in affirming these rulings. Counsel for the Commandant has filed a reply brief urging affirmance of the sanction.[8]

Upon consideration of the parties' briefs and the entire record, the Board concludes that appellant's willful violation of 46 U.S.C. 404 was established by reliable, probative, and substantial evidence. We further conclude, however, that without proof that he was acting or serving in any licensed capacity at the time, no reasonable basis exists for exercising the jurisdiction in 46 U.S.C. 239. Absent such proof, the decisions of the law judge and the Commandant must be reversed and their orders set aside.

The 1968 amendment provides, in part, that vessels exempted from the inspection laws are to be "engaged exclusively in...the carriage of cargo to or from...a facility used or to be used in the processing or assembling of fishery products...." Appellant argues that this is exactly what the MARLIN was doing, since her entire cargo was delivered to this type of facility. His subsidiary argument is that MARLIN was carrying "a very small amount of

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[7]Incorporated with Exhibit 1: see footnote 5, supra.

[8]Oral argument, sought by appellant, is opposed by the Commandant on grounds that the facts are undisputed and the legal issues well defined. We agree that no useful purpose would be served by granting appellant's request and it is accordingly denied. 49 CFR 825.25(b).

non-fishery cargo." We differ with him on both counts.

The cargo manifest shows that about 20 tons were consigned to enterprises wholly unconnected with the fisheries,[9] and 16 additional tons to individuals or businesses with no identifiable connection,[10] whereas 122 tons were for companies known to be fish processors. Only the last category was true fishery cargo and even discounting the probability that much of the cargo in the middle category was not fishery related, the 20-ton figure represented a 1/8-share of MARLIN's overall cargo tonnage. We are persuaded from this evidence that the non-fishery cargo was substantial both in amount and in relation to the total cargo carried.

By definition, the exemption is limited to vessels "engaged in fishing as a regular business." There is no hint in the express terms of the 1968 amendment or its legislative history that any other business or trading relationship was contemplated. Vessels like the MARLIN, although not actually engaged in fishing operations, were considered to be "auxiliary vessels used in connection with the fishing industry" to provide transportation services.[11] For purposes of the exemption, their use is restricted to designated fisheries in a specified geographic area, and their associated trade routes. In this statutory context, it should be apparent that non-fishery cargoes are excluded.

The policy stated in Pacific Shrimp Co. v. U.S. Dept. of Transportation is apposite, as follows: "The purpose of 46 U.S.C. 367, one of the federal inspection statutes, is to promote seagoing safety. Safety legislation must be liberally construed, and courts should not be moved by considerations of convenience and practicality to whittle away and eventually nullify their protection. Exemptions from such legislation must be given a strict construction and should not be enlarged by implication where made in detail.[12] Extending the scope of operations for auxiliary

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[9]An air taxi service, two lodges, a department store, the Standard Oil Company, and various agencies of the federal, state, and local governments, including the Yakutat school system.

[10]Consisting mostly of grocery supplies for Monti Bay Foods and MAllot's General Store.

[11]1968 U.S. Code Cong. and Adm. News, page 2384.

[12]375 F. Supp. 1036, 1042 (W.D. Wash. 1974). There, a fish processing vessel of 3847 gross tons was held subject to the inspection law. Subsequently, a new exemption was enacted for such vessels up to 5,000 gross tons. P.L. 93-430, 1974 U.S. Code Cong.

vessels would have this effect. Since the 1968 amendment goes to great lengths in circumscribing their operations to serve the designated fisheries, the intent of benefiting that segment of the fishing industry alone is manifest. This is also confirmed by legislative history.[13] We hold, therefore, that appellant was not entitled to make MARLIN's cargo service available to all simply by following a prescribed trade route. Since he was fore-warned officially against doing so, it follows that his direction of the vessel's sailing in this instance was in willful violation of the inspection laws, as found by the law judge.

The question remains whether one of these laws, namely, 46 U.S.C. 404, is enforceable against appellant's license. Since a license is not required for vessel ownership (I.D. 6), the sanction's application would be wholly fortuitous where the vessel owner happens to possess a mariner's license. Such an enforcement policy would be subject to challenge on grounds of denying substantive due process "in the sense of being an arbitrary or ...capricious classification"[14] and, in our view, would be uncalled for under the governing laws.

In the first place, we note that 46 U.S.C. 404 itself subjects violators, including both licensed officers and vessel owners,[15] to $500 penalties. The record does not disclose that this method of enforcement was invoked against appellant. Secondly, 46 U.S.C. 239(b) and (d) both refer to acts "committed by any licensed officer... acting under authority of his license..." in relation to the Coast Guard's investigative power. The quoted words are not repeated in 46 U.S.C. 239 (g) with reference to the sanctioning power but have the same effect, since that power depends intrinsically an "investigation of acts of incompetency or misconduct or any violation of...Title 52 of the Revised Statutes...."

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and Adm. News, pp. 4534,4839-40.

[13]The chief legislative concern was that inspection of the auxiliary vessels would "seriously handicap our fisheries [since those] vessels are used for relatively short periods each year in connection with fishing runs, and it would be completely uneconomical to demand that fully inspected vessels meeting all Coast Guard regulations to be utilized for this service. "1968 Adm. News, supra, id.

[14]Gonzakez v. Freeman, 334 F. 2d 570, 575, 578 (D.C. Cir. 1964).

[15]46 U.S.C. 497, 498.

The Commandant held, however, that the limitation of jurisdiction to be licensed activities in 46 U.S.C. 239(d) applies to the former category of acts alone, namely, those involving incompetency or misconduct. Apparently, he refers to the reverse order in which the categories of proscribed acts are distributed in that section.[16] The argument harks back to the Act of May 27,1936, which conforms substantially to the text of 46 U.S.C. 239 as it reads today. It originated as H.R. 8599 and was amended in the Senate prior to enactment. Although the preexisting order was reversed by this amendment, find nothing in the floor debates cited in support of the Commandant's holding[17] indicating that this was done advertently to differentiate one category of proscribed acts from the other. On the contrary, a subsequent conference report shows that the purpose was to establish "somewhat broader provisions directing investigation of all such acts" in addition to marine casualties and accidents.[18] The reason for reversing the categories may be attributed to a desire for clarity or emphasis, or both; but, here again, we are not disposed to look for hidden implications within the sentence structure of the statute. The expression of two successive provisos in the conjunction, as follows: "All acts in violation of...Title 52 of the Revised Statutes..., and all acts of incompetency or misconduct,...committed by any licensed officer acting under authority of his license...,"means to us that both are encompassed by the final qualifying clause.[19]

The Commandant also held that appellant's acceptance of cargo and order to sail provided the necessary connection with licensed activity (C.D. 6). This rationale presents several difficulties, however, since it was neither alleged nor proved that appellant acted in any capacity but that of owner, and the vessel's sailing took place after the Coast Guard had confronted the master directly with its objections to the cargo. Under these circumstances, we have no sound basis for holding that appellant usurped or preempted functions reserved to the master. The prior Commandant's decisions

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[16]The same order occurs in section (b)

[17]Congressional Record, 74th Cong., 2d Sess., Vol. 80, Part 4, pp. 4391-3 and Part 6, pp 6027-9,6460

[18]Cong. Rec., supra, page 7725.

[19]The rule that qualifying words refer to the last antecedent is not inflexible but will be applied acceding to "the sense of the entire act." C. Sands, 2A Sutherland's Statutory Construction §47.33 (4th Ed. 1973): Buscaglia v. Bowie, 139 F. 2d 294, 296 (1st Cir. 1943).

cited as precedent concerned suspension actions against a federally licensed ship's pilot serving at the time under auspices of the Hudson River Pilot's Association.[20] and against a fishing vessel master for sailing without a licensed mate.[21] These cases involving the actual service of licensed officers on vessels would have no applicability here.[22]

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted; and

2. The orders of the Commandant and the law judge suspending appellant's license on probation be and they hereby are vacated and set aside.

KING, Chairman, McADAMS, HOGUE and DRIVER, Members of the Board, concurred in the above opinion and order.

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[20]Appeal No. 491 (Dederick). The precedent value of this case is cast in doubt by recent judicial decisions holding that the Coast Guard does not have jurisdiction to suspend a federal pilot's license where the pilot "was acting as a pilot under state law." Soriano v. U.S. 494 F. 2d 681, 684 (9th Cir. 1974); Dietz v. Siler, 414F. Supp. 1105 (E.D. La. 1976). Cf. Commandant v. Nelson. NTSB Order EM-60, adopted May 12, 1977.

[21]Appeal No. 1574 (Stepkins). This case would be no precedent here in light of a later judicial holding that the owner of such a vessel is not chargeable with offense. U.S. v. Silva, 272 F. Supp. 46 (S.D. Calif. 1967).

[22]See footnote 6, supra.